Hard times for voices from the Global South

Decolonization and the validity of existing treaties

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For a long time, international legal scholars did not devote much attention to protagonists from the Global South as relevant actors in the field. The focus of the discipline – at least in continental Europe – was on contributing to the systematization of the international legal order. The few studies on particular national or regional approaches to international law largely focused on the perspectives of the Soviet and US American superpowers. Since some years this has changed profoundly. Not only did comparative international law recently emerge as a subfield of the discipline (Anthea Roberts, *Is international law international?,* OUP 2017), but also more and more studies on international legal perspectives of diplomats and academics from the Global South appeared, often taking a historical perspective. For instance, a larger academic project celebrates the spirit of the 1955 Bandung Conference for inserting the ideas of equality and justice into international law (Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History and International Law*, CUP 2017). Furthermore, Philipp Dann's and Jochen von Bernstorff's forthcoming edited volume on the *Battles for International Law in the Decolonization Era* discusses how Western, Eastern and Southern scholars and diplomats fought between 1955 and 1975 about how the future international law should look like. Since 2016, even a series on *International Law and the Global South* is published by Springer under the responsibility of Le#la Choukroune and also this blog has given space to debates linking semi-colonialism and the history of international law.

Anna Krueger's dissertation supervised by Jochen von Bernstorff at Tübingen University fits well into this scheme. In three parts, Krueger engages with a key debate of the era of decolonization: Were the existing international treaties binding on the decolonized new states, even though they had no say in the formation of these rules? In the first part, Krueger stresses that colonization was the primary influence for Third World lawyers' thinking about international law. They put their hopes in a less Western dominated and more universal international legal order and a "global solidarity project" (pp. 41-86). This project entailed the establishment of the New International Economic Order which largely failed because of divisions among states from the Global South and its rejection from the West (pp. 114-118). In the second part, Krueger argues that in the debates in the International Law Commission (ILC) and at the international conferences leading up to the codification of the Law of Treaties the positions of the Global South were marginalized. In the discussion about the legal effects of coercion on treaties Western states successfully relegated the claim advanced by non-Western international lawyers to include political and economic pressure (the Nineteen-State-Amendment) to the realm of soft law (pp.

153-198). In the debate on jus cogens Third World international lawyers missed the opportunity to work more closely together with Soviet lawyers and thus failed to introduce the concept of unequal treaties (pp. 199-215). Also, the new states were not successful in strengthening the principle of rebus sic stantibus as a tool against unequal treaties (pp. 215-233). In the third part, Krueger demonstrates how the Special Rapporteur of the ILC Humphrey Waldock based his reports on state succession in respect of treaties on the “clean slate” doctrine favored by most new states. Also, Special Rapporteur Mohammed Bedjaoui in his early reports on state succession and acquired rights forcefully suggested to allow for expropriation without compensation. However, not least because the Organisation of African Unity embraced the concept of uti possidetis, a territorial exception to the “clean slate” doctrine was introduced and the old colonial borders remained in place. Furthermore, Bedjaoui’s report was watered down because of skepticism from the West and from some Third World lawyers and diplomats. Moreover, because many states refused to ratify the resulting Vienna Conventions on State Succession, the treaties had hardly any influence on political practice (pp. 243-391).

Krueger’s deep analysis of the debates in the ILC and at the Vienna conferences reminds us how intensively the battle about the future direction of the international legal order was fought after decolonization. The study shows that Third World lawyers skillfully pushed for an anticolonial international law which appealed to global justice and solidarity. At the same time, as agents of their respective governments they tried to enhance the status of the decolonized states in the international legal order. A particular merit of the study is that Krueger not only refers to the better known positions of the usual suspects Ram Prakash Anand, Mohammed Bedjaoui, and Taslim Elias, but also highlights the pivotal role of the less famous Iraqi Mustafa Yasseen and Afghan Abdul Tabibi in the ILC debates. Krueger also meticulously portrays the tensions between different Third World lawyers thereby somewhat questioning whether a common Third World position really existed. While the study, thus, is an important contribution to the history of the field, I would like to conclude with three (partly critical) remarks on method, context and the objective of the study.

First, methodologically, even though Krueger claims that her study is based on Michel Foucault’s discourse analysis, she does not put particular emphasis on how meanings, identities and power relations are created through (legal) language. Rather Krueger focuses on the much more traditional (but important!) question of the impact of Southern international lawyers on the codification of international law.

Second, at times it seems that the study would have benefited from a deeper engagement with the political context of the legal discussions. For instance, it is hardly explained which specific unequal treaties the respective states had in mind during their discussions about the law of treaties. As an example, Soviet international lawyers embraced fundamental principles and jus cogens in the late 1950s as means to declare the treaties on Western economic and military integration void. What were the specific treaties Third World lawyers had in mind? Maybe Krueger could have gone beyond focusing mainly on UN documents as a basis for her study in order to get closer to the political context.

Third, somewhat unusual for a historical study, Krueger evaluates the historical behavior of Third World international lawyers against the critique of the so-called second generation of TWAIL. Krueger claims that current TWAILER's somewhat unfairly depict the first generation and their belief in the universalizabilty of international law as naïve. In her view, it seemed well possible in the historical context of the 1960s and 1970s that the Third World lawyers' arguments were pushed through. Rather than blaming TWAIL I, the ignorance of the West should be singled out as the main reason for the failure of the project of Third World lawyers. One of the key objectives of Krueger's study comes to the fore: Through her historical analysis she somewhat rehabilitates the first generation of Southern international lawyers against contemporary postmodern critiques.

Anna Krueger, **Die Bindung der Dritten Welt an das Postkoloniale Völkerrecht. Die Völkerrechtskommission, das Recht der Verträge und das Recht der Staatennachfolge in der Dekolonialisierung**, Springer, Heidelberg 2018, 434 pages, 89,99 €, ISBN 978-3-662-54413-6

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